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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE DISTRICT OF ARIZONA
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10 Yvonne Lewallen,

11 Plaintiff,

12 vs.

13 Home Depot USA, Inc.,

14 Defendant.

No. CV-11-1639-PHX-NVW

ORDER

15 Before the Court is Defendant's Motion for Summary Judgment (Doc. 56).

16 On March 22 and 23, 2013, Plaintiff filed a response to the Motion, a statement of
17 facts, and a controverting statement of facts (Docs. 61, 62). Plaintiff's response to the
18 Motion was due March 22, 2013. On March 25, 2013, without explanation or
19 permission, Plaintiff filed a different version of her response to the Motion, a statement of
20 facts, a controverting statement of facts, and some unidentified exhibits. (Docs. 63, 64,
21 65, 66.) On March 26, 2013, Plaintiff filed more unidentified exhibits. (Doc. 67.)

22 One of Plaintiff's exhibits is her April 2, 2012 response to Defendant's motion for
23 judgment on the pleadings; another is her previously filed Second Amended Complaint.
24 Local Rules provide that "[n]o copy of a pleading, exhibit or minute entry which has been
25 filed in a case shall be attached to the original of a subsequent pleading, motion or
26 memorandum of points and authorities." LRCiv 7.1(d)(1). If a party wants to bring
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2 attention to anything contained in a previous pleading, the party must do so by
3 incorporation by reference. LRCiv 7.1(d)(2).

4 Despite Plaintiff's failure to comply with civil procedural rules and failure to seek
5 leave to correct or amend her timely filed response, the documents filed as Docs. 63-67
6 will be construed as the final version of Plaintiff's response to the Motion for Summary
7 Judgment, controverting statement of facts, and statement of additional facts.

8 Defendant's time to file a reply in support of its Motion for Summary Judgment
9 has not expired, but it is unnecessary for Defendant to file a reply because Plaintiff has
10 failed to show a genuine issue of material fact or that Defendant is not entitled to
11 judgment as a matter of law.

12 **I. LEGAL STANDARD**

13 Summary judgment is proper if the evidence shows there is no genuine issue as to
14 any material fact and the moving party is entitled to judgment as a matter of law. Fed. R.
15 Civ. P. 56(c). The moving party must produce evidence and show there is no genuine
16 issue of material fact. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d
17 1099, 1102 (9th Cir. 2000). A material fact is one that might affect the outcome of the
18 suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
19 A factual issue is genuine "if the evidence is such that a reasonable jury could return a
20 verdict for the nonmoving party." *Id.* On summary judgment, the nonmoving party's
21 evidence is presumed true, and all inferences from the evidence are drawn in the light
22 most favorable to the nonmoving party. *Eisenberg v. Ins. Co. of North America*, 815
23 F.2d 1285, 1289 (9th Cir. 1987); *Baldwin v. Trailer Inns, Inc.*, 266 F.3d 1104, 1117 (9th
24 Cir. 2001).

25 A party asserting that a fact cannot be disputed or that a fact is genuinely disputed
26 must support the assertion by citing to specific parts of materials in the record or by
27 showing that the materials cited do not establish the absence or presence of a genuine
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2 dispute. Fed. R. Civ. P. 56(c)(1). “Citing to particular parts of materials in the record”
3 means citing to specific pages and lines of depositions, documents, affidavits or
4 declarations, or other materials that are already in the record or have become part of the
5 record by submission on summary judgment. To support an assertion of fact, the citation
6 must be to something that would be admissible in evidence with proper foundation.
7 Assertions of fact must be supported by evidence, not merely by reference to allegations
8 made in pleadings.

9 “If a party fails to properly support an assertion of fact or fails to properly address
10 another party’s assertion of fact as required by Rule 56(c), the court may . . . consider the
11 fact undisputed for purposes of the motion.” Fed. R. Civ. 56(e)(2). Local Rule 56.1(b)
12 provides:

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14 Any party opposing a motion for summary judgment must file
15 a statement, separate from that party’s memorandum of law,
16 setting forth: (1) for each paragraph of the moving party’s
17 separate statement of facts, a correspondingly numbered
18 paragraph indicating whether the party disputes the statement
19 of fact set forth in that paragraph and a reference to the
20 specific admissible portion of the record supporting the
21 party’s position if the fact is disputed; and (2) any additional
22 facts that establish a genuine issue of material fact or
23 otherwise preclude judgment in favor of the moving party.

24 LRCiv 56.1(b).

25 **II. UNDISPUTED FACTS**

26 Plaintiff was hired by Defendant in 1996. Beginning in 2001, she was employed
27 as a Return to Vendor (“RTV”) associate. Plaintiff is a Mexican-American woman. In
28 September 2009, Cynthia Camarillo (also known as Kat Katayama), Assistant Store
Manager-Operations, began supervising Plaintiff. In February 2010, Melissa Perez, a
Department Supervisor, became Plaintiff’s direct supervisor under Camarillo. Both
Camarillo and Perez are Mexican-American women.

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3 Plaintiff's responsibilities as an RTV clerk included overseeing the process of
4 returning merchandise to vendors that had been returned by customers or was otherwise
5 marked down. Beginning in 2006, Plaintiff's duties also included responsibility for
6 properly disposing Hazardous Materials from the store and documenting that the store
7 has followed Defendant's Handling Hazardous Materials ("HHM") policies, particularly
8 keeping the HHM records updated on a daily basis. On Mondays, Tuesdays, and
9 Wednesdays, Plaintiff was expected to check the store's hazardous waste buckets
10 between 6:00 a.m. and 8:00 a.m., empty them if they contained anything, and document
11 completion of the tasks. On other days, when Plaintiff did not begin her shift until 8:30
12 a.m., she was not responsible for checking and emptying the hazardous waste buckets.
13 Failure to complete the HHM protocols is considered by Defendant to be a Major Work
14 Rule Violation, which subjects an employee to discipline up to and including termination,
15 even for a first violation.

16 In October 2002, March 2003, and September 2009, Plaintiff's performance
17 reviews show that she needed to improve maintaining a clean and uncluttered area, her
18 punctuality/dependability, time management, and solving customers' problems. In 2008,
19 she was counseled for violating Defendant's dress code, and in 2010 or 2011 a customer
20 complained about Plaintiff's low-cut shirt. She was counseled that her two-inch long
21 fingernails were a safety hazard and interfered with her physical work tasks. In 2006, she
22 was counseled for failing to complete her HHM tasks.

23 In March 2010, Plaintiff received an overall "improvement needed" rating on her
24 performance evaluation and "improvement needed" ratings in the categories of respect,
25 professionalism, learning, time management, and store appearance. As a result, she was
26 placed on a performance improvement plan. As part of the plan, she met with her
27 manager and was provided feedback and reviews. She completed the improvement plan
28 in late May 2010. In June 2010, Plaintiff was disciplined for violating Defendant's

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2 policies for yelling at a co-worker in front of a customer and warned that one more Code
3 of Conduct violation would result in immediate termination of employment.

4 In January 2011, Plaintiff was disciplined for violating HHM procedures for
5 failing to “complete and/or retain appropriate documentation of safety, hazardous
6 material or fire code compliance activities.” She was informed that she needed “to
7 understand the severity and the importance of completing the Hazmat Checklist on a
8 daily and timely basis. Hazmat Checklist needs to be complete by 8 a.m. NO
9 EXCEPTIONS!” The notice served as her Final Counseling and informed her that any
10 further HHM infractions would result in termination.

11 On April 22, 2011, Plaintiff was given notice that on April 19 and 20, 2011, she
12 had “failed to empty the red waste cans in both paint and for the pipe fitting machine”
13 and had “continued to sign off on the HHM automation that both cans were emptied
14 when in fact they were not.” The notice stated that Plaintiff’s at-will employment was
15 being terminated at that time.

16 In March 2010, Plaintiff began complaining about management practices related
17 to “holding markdowns,” which did not permit her to timely mark down or return
18 merchandise and caused her area to be cluttered. She alleges that Camarillo retaliated
19 against her for complaining about these practices by giving her a negative performance
20 review in March 2010. The day after receiving the March 2010 review, Plaintiff called
21 Defendant’s employee complaint hotline to complain about the review. Plaintiff also
22 complained about the review to her District Manager. But she did not complain to any
23 manager or supervisor that she was treated unfairly in her March 2010 review because
24 she was Hispanic. During the six months following her March 2010 review, she did not
25 complain to any of Defendant’s employees that she suffered any adverse action because
26 of her race. In October 2010, Plaintiff again complained to her store manager that she
27 and Camarillo had an angry conversation about RTV practices and markdowns of
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2 merchandise. She complained that Camarillo had yelled at her and was angry about
3 Plaintiff's prior complaints about her negative March 2010 review. Plaintiff testified that
4 she was retaliated against because of her complaints about store markdown practices, her
5 March 2010 performance review, and Camarillo's angry or hostile conversation with
6 Plaintiff in October 2010.

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8 Plaintiff does not recall Camarillo ever making discriminatory remarks against
9 Hispanics. The only comments by Camarillo that Plaintiff considered derogatory toward
10 Hispanics were comments about Plaintiff's hair, length of nails, her makeup, and the
11 appropriateness of her clothing for the workplace.

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13 Plaintiff cannot recall complaining that Camarillo demonstrated any bias against
14 Hispanic women in the store at any time. Plaintiff did not complain that she was being
15 discriminated against, harassed, or retaliated against based on her race. She also did not
16 complain that Hispanic associates were being discriminated against generally. After her
17 termination, Plaintiff alleged that two white employees violated HHM policies in April
18 2010 and were not terminated, but she did not know whether those employees were
19 disciplined for the alleged violations. While she was employed by Defendant, she did not
20 complain about violations by the two white employees or complain that they were treated
21 differently than she was.

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23 Plaintiff's Second Amended Complaint alleges race discrimination, harassment
24 because of her race, and retaliation for complaining of race discrimination and
25 harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*,
26 as amended.

27 **III. ANALYSIS**

28 **A. Race Discrimination**

Under Title VII, it is unlawful for an employer "to fail or refuse to hire or to
discharge any individual, or otherwise discriminate against any individual with respect to

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2 his compensation, terms, conditions, or privileges of employment, because of such
3 individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). In
4 a Title VII employment discrimination case, courts apply a "shifting burdens" analytical
5 framework at the summary judgment stage. *McDonnell Douglas Corp. v. Green*, 411
6 U.S. 792, 800-04 (1973). The employee must first establish a prima facie case of
7 discrimination. *Id.* at 802. The burden then shifts to the employer to articulate a
8 legitimate non-discriminatory reason for its employment decision. *Id.* If the employer
9 makes such a showing, the plaintiff must demonstrate that the articulated reasons are not
10 its true reasons, but rather a pretext for discrimination. *Id.* at 804. A plaintiff may do so
11 "either directly by persuading the court that a discriminatory reason more likely
12 motivated the employer or indirectly by showing that the employer's proffered
13 explanation is unworthy of credence." *Texas Dep't of Community Affairs v. Burdine*,
14 450 U.S. 248, 256 (1981). "The ultimate burden of persuading the trier of fact that the
15 defendant intentionally discriminated against the plaintiff remains at all times with the
16 plaintiff." *Id.* at 253.

17 To establish a prima facie case of discrimination under Title VII, a plaintiff must
18 offer evidence from which unlawful discrimination can be inferred. *Vasquez v. Cnty. of*
19 *Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003). This can be done through direct or
20 circumstantial evidence of discriminatory intent or by showing four elements that create a
21 presumption of discrimination: "(1) she belongs to a protected class, (2) she was
22 performing according to her employer's legitimate expectations, (3) she suffered an
23 adverse employment action, and (4) other employees with qualifications similar to her
24 own were treated more favorably." *Id.* at 640 n.5.

25 Plaintiff is a member of a protected class, *i.e.*, Hispanic and/or Latino, and she
26 suffered an adverse employment action, *i.e.*, termination. However, she has no direct
27 evidence of race discrimination or evidence that other employees with qualifications
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2 similar to her own were treated more favorably. Moreover, the evidence shows she was
3 not performing to her employer's legitimate expectations. Because Plaintiff did not
4 establish a prima facie case of discrimination, the burden does not shift to Defendant to
5 articulate a legitimate non-discriminatory reason for its employment decision. However,
6 Defendant has articulated several legitimate non-discriminatory reasons for its
7 employment decision, and Plaintiff has not demonstrated that the articulated reasons are
8 not its true reasons, but rather a pretext for discrimination.

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10 **B. Race Harassment**

11 To establish a claim that racially based harassment created a hostile work
12 environment, Plaintiff must show: (1) she was subjected to verbal or physical conduct of
13 a racial nature, (2) the conduct was unwelcome, and (3) the conduct was sufficiently
14 severe or pervasive to alter the conditions of her employment and create an abusive work
15 environment. *Vasquez*, 349 F.3d at 642.

16 Plaintiff testified that Camarillo criticized Plaintiff's hair, length of nails, her
17 makeup, and the appropriateness of her clothing for the workplace because Camarillo did
18 not like her, but she does not recall any comments or actions that would show Camarillo
19 did not like her because she is Hispanic. Plaintiff has not shown that she was subjected to
20 verbal or physical conduct of a racial nature.

21 **C. Retaliation**

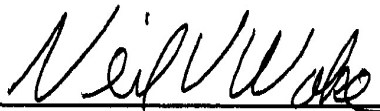
22 Title VII's anti-retaliation provision forbids employer actions that "discriminate
23 against" an employee because he has "opposed" a practice that Title VII forbids or has
24 "made a charge, testified, assisted, or participated in" a Title VII "investigation,
25 proceeding, or hearing." 42 U.S.C. § 2000e-3(a). To make out a prima facie case of
26 retaliation, Plaintiff must establish that she undertook a protected activity under Title VII,
27 her employer subjected her to an adverse employment action, and there is a causal link
28 between those two events. *Vasquez*, 349 F.3d at 646.

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2 Plaintiff has not established that she opposed a practice that Title VII forbids. She
3 does not recall complaining that she or anyone else was she was being discriminated
4 against, harassed, or retaliated against based on race. She claims she was retaliated
5 against because she complained about management practices regarding "holding
6 markdowns," she complained about her March 2010 review, and she complained about
7 Camarillo yelling at her in October 2010 for complaining about the March 2010 review.
8 She has not made out a prima facie case of retaliation under Title VII.

9 IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment
10 (Doc. 56) is granted.

11 IT IS FURTHER ORDERED that the Clerk enter judgment in favor of Defendants
12 and against Plaintiffs and that Plaintiffs take nothing. The Clerk shall terminate this case.

13 Dated this 19th day of April, 2013.

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17 Neil V. Wake
18 United States District Judge
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